No. 11,927

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

PATSY O'ROURKE KENDIG,

Appellant,

vs.

MARY BOONE KENDIG, and
UNITED STATES OF AMERICA,

Appellees.

Appeal from the United States District Court for the District of Arizona

Brief of Appellee
Mary Boone Kendig

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United States

Circuit Court of Appeals

For the Ninth Circuit

PATSY O'ROURKE KENDIG, a widow, *Appellant,* vs. MARY BOONE KENDIG, a widow, and UNITED STATES OF AMERICA, *Appellees.*	No. 11927

Brief of Appellee

Mary Boone Kendig

In this brief the parties will be referred to by their designations in the District Court, viz: Appellant as plaintiff and appellees as defendants. References to the printed transcript of record will be indicated by the letter "T" followed by numerals denoting the page number.

STATEMENT OF THE CASE

Defendant, Mary Boone Kendig, adds to the plaintiff's Statement of the Case the following:

Patsy O'Rourke Kendig was not definite in her testimony with reference to the statement alleged to have been made by Wiley SoRelle Kendig regarding the change of the beneficiary of his life insurance, and such testimony was received over the objection that it constituted hearsay (T40). She never saw any change of beneficiary form (T41). In March, 1945, she wrote the Bureau of Naval Personnel making inquiry as to whether or not Wiley SoRelle Kendig had changed the beneficiary in his life insurance policy, and in that letter she did not indicate that he had had any conversation with her relating to a change. (T79, 80, 83, 84, 85 and 87).

George Kendig had made an affidavit at the request of Patsy O'Rourke Kendig relating to an alleged conversation with Wiley SoRelle Kendig regarding a change of beneficiary of his life insurance (T70). The affidavit was received in evidence over the objection that it constituted hearsay and covered the same ground as in the affiant's deposition received in evidence (T92, 93).

The deposition of George Kendig was taken in Dallas County, Texas (T78). In his deposition he insisted he was making a deposition on his affidavit (T62, 63, 64), and wanted to read the affidavit as his deposition (T48). At the taking of the deposition, he testified that he couldn't remember anything that was said by Wiley SoRelle Kendig (T53, 54, 67, 68). He testified he couldn't recall any other point in the conversation or why the subject of insurance was brought

up (T60, 72). He couldn't recall whether the conversation was in the day time or at night, and he had no recollection of previous activities of himself and Wiley SoRelle Kendig (T71). In testifying that Wiley SoRelle Kendig told him that he had sent in a form to change his life insurance policy, he said, "I might as well make it that because I am not sure" (T58). The testimony of George Kendig relating to alleged statements of Wiley SoRelle Kendig regarding a change of beneficiary was objected to on the ground that it constituted hearsay (T47). George Kendig never saw any instrument of any kind pertaining to a change of beneficiary (T56).

ARGUMENT

I

The plaintiff has set forth two specifications of errors, namely, that the court erred in refusing to admit the testimony of Ralph E. Palmer, and that the court erred in granting defendants' motion to direct the jury to return a verdict for the defendants. We shall take up these matters in the same order in which they have been set forth by the plaintiff, and shall show that the court did not err in rejecting the proffered testimony of Ralph E. Palmer, and did not err in directing a verdict for the defendants.

Plaintiff produced as a witness Ralph E. Palmer and offered to show by him that some state of confusion existed in the Veterans Administration in Washington in the handling of forms and correspondence (T99). Mr. Palmer's experience with the Veterans Administration began on March 19, 1946, when he was sworn in as an employee in Washington and began a four

weeks training for service in the Phoenix office (T98). The instruction lasted for about two weeks, and then he remained about two weeks around the various departments in the Washington office along with the other students acquainting themselves with the routine (T98, 99). All of this was approximately two years after the death of Wiley SoRelle Kendig, and anything that Mr. Palmer might or could have observed at that time could have no bearing upon any issue in this case.

Obviously it would have been improper for the court to receive the testimony of Mr. Palmer and to permit the jury to consider or speculate upon the same. The testimony was properly excluded, not only because there was no showing that the witness had any knowledge of conditions at or prior to the time of the death of Wiley SoRelle Kendig, but also because such testimony is too vague, general and indefinite to constitute credible evidence, and at most would be but the conclusions of the witness. The plaintiff has cited no case in which testimony has been received to show conditions in the office of the Veterans Administration.

II

Plaintiff's second specification of error is that the court erred in directing a verdict for the defendants.

In view of the indefiniteness of Patsy O'Rourke Kendig regarding the conversation alleged to have been had between Wiley SoRelle Kendig and herself relating to the change of his insurance (T40), and in view of the fact that when she wrote the bureau of Naval Personnel in March, 1945, inquiring as to whether or not he had made any change of beneficiary, she made no reference to any alleged conversations with him relating to same, but referred only to a statement attributed

to George Kendig, it is doubtful whether she had any conversation whatever with Wiley SoRelle Kendig about any such change.

Also, as has been pointed out in this brief, George Kendig, in his deposition, was very vague, indefinite and uncertain as to any conversation alleged to have been had by him with Wiley SoRelle Kendig regarding a change of beneficiary; and while plaintiff argues that the deposititon of George Kendig should be given special force because of the fact that he is a son of the defendant, Mary Boone Kendig, yet an examination of the deposition will readily show that for a reason not therein disclosed George Kendig had an obvious desire to build up the plaintiff's case and was definitely hostile, even to the attorney for the defendant, Mary Boone Kendig.

But giving the testimony the most favorable construction for the plaintiff, which, of course, must be done if the testimony is admissible, the court was right in directing a verdict for the defendants.

The plaintiff's proofs at most can establish only that during his lifetime Wiley SoRelle Kendig told his wife, Patsy O'Rourke Kendig, that he had changed his National Service Life Insurance Policy so as to make his wife instead of his mother, Mary Boone Kendig, his beneficiary; and that Wiley SoRelle Kendig in his lifetime told his brother, George Kendig, that he had sent in a form to effect such change of beneficiary. The only other thing upon which the plaintiff might attempt to rely is a confidential personal report, dated February 5, 1944, which Wiley SoRelle Kendig left in his own papers and in which the beneficiary of his insurance was recited to be his wife.

Plaintiff in her brief has set forth the pertinent part of the regulations pertaining to the changing of a beneficiary in a National Service Life Insurance policy, and correctly states that something less than absolute compliance with the regulations may be found sufficient. The plaintiff cites a number of cases to the effect that all that is necessary to change beneficiaries in such policies is for the insured to express clearly his intent to make a change, and for him to take affirmative action to effectuate such intent.

As to the better reasoned cases, we are not in serious disagreement with plaintiff's position in this regard. It must be pointed out, however, that in some of the cases the courts have fallen into the error of admitting letters or statements of the deceased insured as proof of the affirmative action itself, said to have been taken, instead of admitting such letters and statements to prove only an intent on the part of the deceased to take such affirmative action. In other words, some of the courts have failed to recognize that as to the proof of the doing of the alleged act necessary to effectuate a change of beneficiary, the statements and letters of the insured constitute hearsay and are inadmissible. With this observation in mind, let us examine the cases, most of which have been cited in plaintiff's brief.

The only case found which appears identical with the case at bar is

> Bradley v. United States, et al, 143 Fed. (2d) 573, (decided May 30, 1944), Circuit Court of Appeals of the Tenth Circuit.

There the mother of the naval flier officer was named beneficiary. Later the insured married. After his

death there was found in his papers a confidential personal report required of all flying officers, dated the day before his death, in which he stated that he had government insurance in the amount of $10,000.00 and that his wife was the beneficiary.

At the trial of that case the wife testified, over objection, that the insured discussed his insurance with her prior to his death and had expressed his intention of changing the beneficiary to her when he got to March Field, and that he later informed her that "he had taken care of the insurance at the army base." (143 Fed. (2d) 574).

The court found in the Bradley case that the undisputed evidence fully supported the findings of the district court that the insured intended to change the beneficiary of his insurance from his mother to his wife, and then the court added:

> "But the principle which actuates the courts in giving effect to the ascertained intentions of the insured has application only where the party has attempted to act for himself. * * * We can only liberally construe that which he has attempted to do in his own behalf, but for some reason has failed to accomplish the desired or intended result. This is a fundamental rule of equitable jurisprudence which guides and directs equitable proceedings." (143 Fed. (2d) 576, 577).

It was argued that the confidential personal report in the Bradley case constituted not only an expression of the insured's intention but also an attempt to change the beneficiary from his mother to his wife. But the court refused to give it such effect saying:

> "At most it indicates a belief or understanding that his wife was the then present beneficiary.

> When given its most liberal construction in the light of all the facts and circumstances, we are convinced that it cannot be treated as an effectuation of the insured's intention to change his beneficiary." (143 Fed. (2d) 577).

It will be noted that the case at bar is a direct parallel with the Bradley case.

In the Bradley case, there was a dissenting opinion filed by Judge Phillips in which he held that the making of the confidential personal report and the delivery of the policy of insurance to his wife should effect the change of beneficiary. It will be noted that in the case at bar the policy of insurance was not delivered to the plaintiff, Patsy O'Rourke Kendig, but was left by Wiley SoRelle Kendig with his mother, Mary Boone Kendig (T97); so even under the dissent of Judge Phillips one of the elements necessary to have shown a change of beneficiaries is lacking in the instant case.

A more recent case has been decided by the Tenth Circuit Court of Appeals, namely,

> Collins v. United States, et al, 161 Fed. (2d) 64, (decided March 17, 1947).

In that case the insured went to the office of personal affairs of his camp, secured regular form number 336 furnished by the Veterans Administration for effecting a change of beneficiary, had an employee of the office fill out the form, signed it in duplicate and took both with him. He was an officer and kept one in his desk at the field; the other he showed to his wife, told her what it was and told her if anything happened to him to give it to her father who would know what to do with it. It was then left in a desk at the home

where he and his wife lived. After his death, the change of beneficiary form was first sent to the Veterans Administration.

The court in the Collins case said that the very narrow question in the case was whether it was necessary to send in the change of beneficiary form during the insured's life; and the court held that same was merely a ministerial act and unnecessary to effect the change, and particularly where, as here, the government in its brief had waived any requirement of the regulation that the change be filed with the Veterans Administration. Obviously the Collins case is consistent with the Bradley case.

In the case of

> Shapiro v. United States, et al, 166 Fed. (2d) 240, (decided March 4, 1948), Circuit Court of Appeals of the Second Circuit,

it was held that a change of beneficiary had been effected where the insured, shortly after marrying, had gone to his battalion adjutant, notified him of his marriage, stated that he wished to change the beneficiary on his policy from his mother to his wife, had been given War Department AGO Form No. 41, entitled "Designation of Beneficiary," which the insured had filled out naming his wife as primary beneficiary and his mother as alternate beneficiary, and which he had left with the adjutant for forwarding. The form actually was intended for use in designating the beneficiary of the so-called six months gratuity, but the adjutant testified that he did not know there was another form.

In reaching its conclusion that a change of beneficiary had been effected, the court in the Shapiro case

relied upon Collins v. United States, supra, Roberts v. United States, 157 Fed. (2d) 906, Kachefsky v. Kachefsky, 110 Fed. (2d) 836, Claffy v. Forbes, 280 Fed. 233, Egleston v. United States, 71 Fed. Supp. 114, and Citron v. United States, 69 Fed. Supp. 830, and the Bradley case, supra; and in discussing the Bradley and Collins cases, decided by the same court, said that each decision dealt with the question whether the evidence in the particular case showed that the insured had performed an act with the intent to change his beneficiary, and the Bradley decision held that he had not and the Collins decision that he had. The court then said:

> "We cannot say that either decision differs as a matter of law from the other decisions we have cited, or from the conclusion we have reached in the case at bar." (166 Fed. 2d) 242).

In two other cases cited by plaintiff, the insured through error also had used the wrong form, namely, War Department AGO Form No. 41, in attempting to change the beneficiary. Those two cases are

> Citron v. United States, et al, 69 Fed. Supp. 830 (decided January 29, 1947 by D.C., D.C.) and
> Woods v. United States, 69 Fed. Supp. 760 (decided Jan. 30, 1947 by D.C.M.D. Alabama)

In the Citron case the insured went to the Finance Office of his camp and requested the clerk in charge to give him a form in order that he might change the beneficiary of his National Service Life Insurance to his wife. W.D. AGO Form No. 41 was given him and he filled it out and left it for forwarding. It was forwarded to the War Department and found after his

death. The officer in charge of the insurance program of the War Department testified that army officials, at home and abroad, used that form for changing the beneficiaries on insurance. The court held that he had done everything which reasonably could be expected of him to accomplish his purpose and that the change was effected.

In Woods v. United States, supra, the intent to change the beneficiary was amply shown and the insured executed the Form No. 41 believing that it was the form required for the change; and the court properly again held that he had done all that could be expected of him.

In the case of

> Mitchell v. United States,
> 165 Fed. (2d) 758, (decided
> January 14, 1948), Fifth Circuit
> Court of Appeals,

the insured had named his mother as beneficiary and later married. The widow testified that on her wedding day he told her he was taking out a policy in her name. Before going over seas the insured, as a part of his processing, filled out a Government Insurance Report Form on which he filled in his wife's name as that of beneficiary of his insurance. The report was filed with the War Department and a copy sent by it to his wife.

In conversations and in correspondence, the intent of the insured in the Mitchell case to make his wife the beneficiary was clearly expressed. The court pointed out that the mere intent to change the beneficiary is not sufficient, and that such an intent must be followed

by some affirmative act on the part of the insured, evidencing an exercise of the right to change the beneficiary. The court said that these cases are difficult of decision, but it held that the insured had affirmatively acted to make his wife his beneficiary and held that the beneficiary had thus been changed. The same case in the District Court is reported as

Rutledge v. United States, et al,
72 Fed. Supp. 352,

and in the District Court's opinion the court stressed the fact that a fellow officer saw the insured sign the Government Insurance Report Form in which he named his wife as beneficiary.

In the case of

McKewen v. McKewen, et al,
165 Fed. (2d) 761,
(decided January 23, 1948)
Fifth Circuit Court of Appeals,

the court in reaching its conclusion said that the case was controlled by the opinion of that court rendered January 14, 1948 in Mitchell v. United States, supra.

In the McKewen case the insured, after his marriage and while in camp in Nebraska, filled out two official forms furnished by the government known as Officer's Data Sheet and Government Insurance Report Form. In each of these he showed his wife as the beneficiary of his $10,000.00 policy and delivered same to the Government and the Government sent a duplicate to his wife. Later, at his base in England, the insured filled out Officer's Data Sheet in which he again stated that his wife was the beneficiary of his insurance.

The court points out in the McKewen case that these forms were executed pursuant to army orders, rules or regulations and that the Veterans Administration accepted the Government Insurance Report Form and the Officer's Data Sheet as a valid change of beneficiary. The court said that these were official documents and:

> "The declarations in these documents are not in the category of unofficial, ex-parte, or oral statements made to the wife or to the mother in response to inquiries, or in answer to protests against the making of someone the beneficiary." (165 Fed. (2d) 764).

In the case of

> Gann, et al, v. Meek, et al,
> 165 Fed. (2d) 857, (decided
> January 27, 1948), Circuit Court
> of Appeals of the Fifth Circuit,

the policy originally named the mother as beneficiary; then the insured marine married and by the use of the regular form for that purpose had the beneficiary changed to his wife. In this action the mother claimed that she again had been made beneficiary. The marine, while somewhere in the Pacific, wrote his brother in the United States stating in effect that he had again made his mother the beneficiary. The court apparently was much impressed by the fact that the marine was in an area of heavy fighting in the South Pacific and that another marine testified as to the great amount of confusion, irregularity of mail and loss of mail due to war conditions, and the court commented that the marine had once previously changed his beneficiary so he knew what forms were required.

The majority of the court in the Gann case then held that a change of beneficiary had been effected. A strong dissenting opinion was filed by Judge Sibley. In that dissenting opinion, it was correctly pointed out that the letter of the marine to his brother is hearsay and should have been excluded and a verdict directed.

The case of

> Egleston v. United States, et al,
> 71 Fed. Supp. 114, (decided
> April 18, 1947), District Court
> of the Eastern District of Illinois,

is a case in which the insured instead of writing the Veterans Administration wrote his wife, after sailing for the Pacific, directing her to have his insurance so changed that she would be the beneficiary. The wife instead of sending her husband's letter to the Veteran's Administration, wrote it and it refused to make the change on her request. After the soldier's death, the letter was sent to the Veterans Administration. The court was of the belief that the letter constituted a sufficient notice of change of beneficiary, and the fact that the wife did not send it to the Veterans Administration during his lifetime was immaterial.

The case of

> Roberts v. United States,
> 157 Fed. (2d) 906, (decided
> November 11, 1946),
> Fourth Circuit Court of Appeals,

is relied upon by the plaintiff, but in that case the insured and a fellow officer, who had been married the same day, went to the office where the officers' records were kept at the Naval Air Station and stated that they

wished to change their insurance policies to make their wives the beneficiaries. Each of the men was furnished a set of forms to fill out, and the clerk agreed to take charge of the papers and put them in the proper channels. The two officers stood side by side and made out the forms, and the other officer saw the deceased change the beneficiary to his wife. The form was not found in the Veterans Administration. A confidential form was found in the Navy records in an envelope sealed by the deceased. There was also a card in his handwriting in which he said his wife was his beneficiary. This was an official record kept with the records of the squadron from the entry of the officer therein until his transfer. The court held that a change of beneficiary had been effected.

The court in the Roberts case after pointing out all of the foregoing said:

> "In the pending case, we have found that the insured not only expressed his intention to change the beneficiary in the policy, but also set in motion the machinery devised by the United States to accomplish the desired result. In this way he performed the affirmative act for the lack of which the majority of the court in the Bradley case concluded that the change of beneficiary had not been accomplished." (157 Fed. (2d) 909).

Likewise, in

> Johnson v. White, et al,
> 39 Fed. (2d) 793,
> (decided in 1930)
> Eighth Circuit Court of Appeals,

the insured went to the Company Headquarters and asked to have his insurance policy changed so that his wife would be the beneficiary, and the officer said:

"Give us your wife's name and we will have it changed," (39 Fed. (2d) 795);

and the insured gave the officer his wife's name and address. The court found that in view of the fact that he had applied to the officers in charge of that branch of the service, had requested them to make the change, and was there given what seemed to him assurance that the change had been or would be made, the change should be effected.

In the case of

Walker v. United States, et al,
70 Fed. Supp. 422,
(decided February 21, 1947),

the District Court of the Southern District of Texas found that letters sent the wife by the insured, both while in the states and abroad, showed clearly that he intended his wife to be the beneficiary. The "Report of Death" made by the Adjutant General of the War Department to the Veterans Administration showed his wife as beneficiary. Some of the letters of the insured to his wife had indicated that he had taken steps to change his beneficiary. The District Court concluded that the information regarding the wife being the beneficiary must have come to the War Department from the insured, and that circumstantial evidence showed that a change of beneficiary had been made.

The case of

Van Doren v. United States, et al, 68 Fed. Supp. 222, (decided October 4, 1946), District Court of the Southern District of California,

was one wherein the insured was single when he took out his insurance, made his father the principal beneficiary, later married and executed a paper entitled "Designation or Change of Address of Beneficiary" in which he stated that his wife was his beneficiary. The widow upon his death brought action against the United States, and against the father who was named the principal beneficiary and the sister who was named contingent beneficiary in the insured's policy. Neither the father nor the sister appeared nor defended but only the Government defended.

The court in the Van Doren case said it was difficult to follow the reasoning of the Government, which alone defended, in view of the fact that the Government had produced the document at the trial and turned it over to the widow. Apparently the court was impressed by the fact that neither the father nor the sister contested the widow's case and that the Government should not make any point of the form of the document or where it was filed, that is, whether with the War Department or the Veterans Administration.

The case of

> Ramsay v. United States, et al, 72 Fed. Supp. 613, (decided July 31, 1947), District Court of the Southern District of Florida,

held that a change of beneficiary had not been effected. The court pointed out that the insured was in the United States for many months before being sent into the Pacific area and stated:

> "It would have been very easy for the insured at any time between February, 1943 and his departure from Jacksonville to the Canal Zone and

to the West Coast to have taken the certificate of insurance and sent it to the Veterans Administration and had a change of beneficiary entered thereon, if he had desired or dared to do so. The record contains no evidence upon which the court would be justified in holding that insured did everything in his power to effectuate a change of beneficiary." (72 Fed. Supp. 616).

This court, in

Leahy v. United States,
15 Fed. (2d) 949,
(decided in 1926),
Ninth Circuit Court of Appeals,

in an action by a widow against the United States and a sister of the insured to recover on a War Risk insurance policy which was taken out when the insured was single, held that a change of beneficiary in favor of the widow had not been made out, although a copy of what purported to be a letter to the Veterans Bureau was found in the insured's files after his death, and in which letter it appeared that he had asked for the change of beneficiary. But the court pointed out that he had lived for two years after the date of the alleged letter and had done nothing further about making a change, and the letter was not received by the department, and there was no proof of mailing.

The case of

Kingston v. Hines,
13 Fed. (2d) 406, (decided in 1926), District Court of the Western District of Michigan,

and cited with approval in the Bradley case, contains one of the clearest enunciations of the law relating to hearsay testimony in cases such as the one at bar. In that case the soldier had designated his wife as beneficiary. He had some marital difficulties with his wife and he wrote his mother indicating clearly his intentions to make his mother his beneficiary in place of his wife on his War Risk insurance policy. Later he wrote his mother in substance that he had made the change. These letters constituted the evidence claimed by the mother to establish a change of beneficiary. In holding that the letters were not admissable as proof of the alleged affirmative act the court said:

> "An examination of the authorities convinces the court that the letter of August 1, 1918, is inadmissible to establish the alleged fact of change of beneficiary. It is subject to all of the infirmities of hearsay evidence. It amounts to no more than a declaration by a deceased person that he had changed a beneficiary. Such a statement does not fall within any of the recognized exceptions to the rule denying the admissibility of hearsay evidence." (13 Fed. (2d) 407, 408).

CONCLUSION

An endeavor has been made to analyze all of the cases found which it was felt would be helpful in determining the case at bar.

It will have been noted that the only case parallel to the instant one is the Bradley case.

It also will have been noted that in practically all of the cases wherein a change of beneficiary was held to have been effected not only was there clearly shown the intent of the insured to make the change, but also it was

established by competent evidence that the insured by affirmative act had done all that he reasonably could under the circumstances.

In Shapiro v. United States, Woods v. United States, and Citron v. United States he had been furnished with and had used Form No. 41, instead of Form No. 336.

In Collins v. United States he had made out the correct form, but it wasn't filed with the Veterans Administration until after the insured's death. The insured used the wrong Designation of Change of Beneficiary in Van Doren v. United States. In Egleston v. United States the insured sent the letter directing change of beneficiary to his wife instead of the Veterans Administration, and it was not sent to the latter until after the insured's death.

In Johnson v. White the insured went to Company Headquarters, told the officer in charge that he wanted his wife made the beneficiary of his insurance, gave the information requested and went away with the assurance the change was made.

In Roberts v. United States the correct form was clearly shown to have been executed by the insured and left in proper military channels for forwarding.

Mitchell v. United States and McKewen v. McKewen, while not as clear cut as the other cases above mentioned, are ones in which the insured, by official documents filed with the War Department and by the latter also served upon the wife, named the wife as beneficiary.

Gann v. Meek and Walker v. United States do not appear to be supported by clear reasoning or sound principles. In the former, the dissenting opinion is in

line with the holdings in the great majority of the other cases.

In the case at bar, there is no admissible evidence that Wiley SoRelle Kendig ever took one affirmative step to change his beneficiary. He executed no form. He applied for no change through the Navy or other channels. He wrote no letters requesting a change. He was in the United States, located in New Jersey. As some of the courts have pointed out, it would have been an easy matter for him, or one in his position, to have made the change had he desired to do so.

There was not even produced a single letter showing that he intended to make the change. Whether he at times thought of making his wife his beneficiary in the place of his mother but could not bring himself to do it, no one ever can know. But of this we may be sure—he left no change of beneficiary of any kind that has been found in the more than four years since his death; and no one, in or out of the military service, has been found who says he saw the insured take any step whatever to effect a change of beneficiary, or that the insured ever asked for or received any form for such change, or stated to any officer or clerk in the Navy or the Veterans Administration that he desired to make a change.

The record, then, is wholly barren of any evidence from which it might be found that Wiley SoRelle Kendig took the required affirmative step to change his beneficiary, and the Court correctly directed the

verdict for the defendants. The judgment should be affirmed.

Respectfully submitted,

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